UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID LANE JOHNSON, Plaintiff, v. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, ET AL., Defendants.	Civil Action No. 1:17-cv-05131-RJS

DEFENDANT NFLPA'S [REDACTED] MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6), the National Football League Players Association (the "NFLPA" or "Union") moves to dismiss all Counts against it set forth in Plaintiff David Lane Johnson's ("Plaintiff" or "Johnson") First Amended Complaint and Petition to Vacate Arbitration Award (Doc. No. 39) ("FAC"): Eight and Ten (breach of duty of fair representation ("DFR")), Nine (violation of Labor-Management Reporting and Disclosure Act ("LMRDA")), and Eleven (Declaratory Judgment Act).

Collectively, these claims constitute Johnson's effort to blame his own Union for a neutral arbitrator denying Johnson's appeal from a 10-game suspension for his second violation of the NFL Performance-Enhancing Substances Policy (the "PES Policy"). But Johnson has no one to blame other than himself. The binding arbitration Award and incorporated-by-reference arbitral record chronicle Johnson's sworn admission to deliberately ingesting a "non-FDA-approved," [redacted] that contained a banned PES which he obtained from an unidentified "friend." His effort to forge non-existent legal claims against the NFLPA out of a laundry list of gripes that demonstrably did *not* cause him to lose his arbitral appeal fails as a matter of law.

Johnson's suspension and resulting financial/contractual penalties are the only injuries alleged. Yet even taking at face value Johnson's version of the "facts," it is beyond dispute that the NFLPA's purported acts or omissions did not cause Johnson to lose his disciplinary appeal. The Award itself expressly rejects, point-by-point, Johnson's complaints about purportedly missing information and secret "side agreements" and collection and testing defects. Furthermore, the Award held that Johnson's complaints were inconsequential to the outcome of the Award, which was the inexorable result of Johnson's testimony about taking an [redacted] containing a PES in violation of the Policy. Until and unless Johnson succeeds in his effort to vacate the Award, he is bound by the Arbitrator's final and binding decisions, which are dispositive

as to each of Johnson's Counts against the NFLPA.

Johnson's attempt to contrive DFR or LMRDA claims to blame the NFLPA for his own behavior simply misses the legal mark. Johnson cannot clearly allege facts demonstrating that he has suffered an "injury in fact" that is "fairly traceable" to the NFLPA's purported conduct; therefore, he lacks Article III standing and this Court lacks subject matter jurisdiction. And the Declaratory Judgment Act claim fails for the additional reason that Johnson complains only of past or speculative harm, which is not a proper subject of declaratory relief.

Moreover, and independently, Johnson has failed to state DFR and LMRDA claims as a matter of law. His DFR claims fail because he has not come close to meeting his "enormous burden" to plead concrete specific facts of arbitrary, discriminatory, or bad faith conduct by the NFLPA. The vast majority of Johnson's accusations are neither specific to him nor his arbitral appeal, but are in fact general complaints about the Union's administration of the Policy. Such determinations are well within the NFLPA's broad discretion under federal labor law. Johnson simply cannot overcome Supreme Court precedent that judicial review of a union's conduct vis-a-vis its members is limited and "highly deferential." Johnson also fails to plead that the Union's alleged conduct plausibly contributed to an erroneous arbitral decision, which is an additional legal requirement that applies to DFR claims in "hybrid" cases such as this one.

The LMRDA, Section 104 claim fails because Johnson *does* have access to the collective bargaining agreement and, in any event, he once again cannot trace his injury—the suspension—to the LMRDA violation that he alleges.

BACKGROUND

A. Johnson Twice Tests Positive for PESs

The PES Policy, which was appended to the Complaint, provides that "Players are responsible for what is in their bodies and a positive test will not be excused because a Player was

unaware that he was taking a Prohibited Substance." FAC, Ex. B, Doc. No. 39-2, Arb. Award ("Award") ¶ 6.43 (quoting FAC, Ex. A, Doc. No. 39-1, 2015 PES Policy ("Policy") at 8).

In 2014, Johnson tested positive for a banned PES under the Policy. *Id.* ¶ 4.1. Johnson did not pursue an appeal, was suspended for four games without pay, and going-forward became subject to "reasonable cause testing" under the then in-effect Policy. *Id.* ¶¶ 4.1, 6.5. He publicly stated: "I got what I deserved. Players have done this before, they've been in my shoes. As a professional, you're supposed to be aware of what you put in your body and take precautions. It's something I didn't do and now I'm paying the price."[1]

On July 12, 2016, Johnson again tested positive for a PES banned by the Policy. *Id.* ¶¶ 1.1, 4.1. He publicly stated: "I feel like I let the team down" and "It's all on me."[2] The collectively bargained consequence of the second positive test was a 10-game suspension without pay. Policy at 10 ("The second time a Player violates this Policy by testing positive for a Prohibited Substance; attempting to substitute, dilute or adulterate a specimen; manipulating a test result; or by violation of Section 5, he will be suspended without pay for *ten* regular and/or postseason games.")

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[1] ESPN, *Eagles' Lane Johnson: 'It's all on me'* (July 25, 2014), *available at* http://www.espn.com/blog/philadelphia-eagles/post/_/id/6558/eagles-lane-johnson-its-all-on-me. The Court may take judicial notice of these and other undisputed public statements by Johnson. *See, e.g.*, *Boarding Sch. Review, LLC v. Delta Career Educ. Corp.*, No. 11 Civ. 8921 (DAB), 2013 WL 6670584, at *1 n.1 (S.D.N.Y. Mar. 29, 2013) ("It is generally proper to take judicial notice of articles and Web sites published on the Internet") (citation omitted); *U.S. ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 973 (W.D. Mich. 2003), *aff'd sub nom. Dingle v. Bioport Corp.*, 388 F.3d 209 (6th Cir. 2004) (taking judicial notice of newspaper article because "the Court found that this source of information is not subject to reasonable dispute"). In any event, on a Rule 12(b)(1) motion, the "court properly consider[s] evidence outside the pleadings." *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). To the extent the Court declines to take judicial notice of Johnson's public statements, the NFLPA will not rely on any of them in connection with its Rule 12(b)(6) motion.

[2] ESPN, *Lane Johnson on his suspension: 'It's all on me'* (Dec. 20, 2016), *available at* http://www.espn.com/nfl/story/_/id/18320734/lane-johnson-philadelphia-eagles-let-team-ban.

(emphases in original). Johnson appealed his discipline. Award ¶ 4.4.

B. Johnson's Arbitral Appeal

For decades, arbitrators for player appeals under the PES Policy were unilaterally selected by the NFL. However, in 2014, the NFLPA successfully bargained to change the PES Policy to require neutral arbitration, and now player appeals are heard by neutrals. *See* Policy at 13. Johnson's appeal was heard by one of the neutrals—James Carter, an arbitrator with unsurpassed credentials.[3] Indeed, Johnson's own counsel told Arbitrator Carter: "we have no objection to your qualifications." Refiled Mot. to Vacate Arb. Award, Ex. 5, Doc. No. 52-6, Disc. Hr'g Tr. ("Disc. Hr'g Tr.") 6:2-10.

The Policy authorizes arbitrators only to affirm or vacate—not modify—discipline. *See* Policy at 16 ("The arbitrator shall not . . . have authority to: (1) reduce a sanction below the minimums established under the Policy; or (2) vacate a disciplinary decision unless the arbitrator finds that the charged violation could not be established.").

On September 28, 2016, Johnson submitted his Pre-Hearing Statement and Basis of Appeal pursuant to the PES Policy (Award ¶ 4.8), which must "set[] forth the specific grounds upon which the appeal is based." Policy at 18. Arguments not set forth in the Basis of Appeal are precluded from being raised at the appeal hearing absent "extraordinary circumstances." *Id.* The Basis of Appeal said nothing about the arbitrator selection and bias objections that Johnson had raised

[3] *See* WilmerHale, James S. Carter—Professional Activities, *available at* https://www.wilmerhale.com/james_carter/ ("Mr. Carter is chair of the Board of Directors of the New York International Arbitration Center. He is a former chairman of the Board of Directors of the American Arbitration Association, a member of the Court of Arbitration for Sport in Lausanne, Switzerland and a former member of the London Court of International Arbitration, for which he also served as vice president of its North American Council. He is an advisor to the American Law Institute's reporters drafting the Restatement of the US Law of International Commercial Arbitration and is a former president of the American Society of International Law.").

previously (and thus knew about) and raises again now.

On October 4, 2016, neutral Arbitrator Carter presided over Johnson's appeal. He heard seven hours of sworn testimony and argument and made myriad evidentiary rulings for and against Johnson. Johnson was represented at the appeal hearing by his three personal lawyers in this action. *See* Refiled Mot. to Vacate Arb. Award, Ex. 3, Doc. No. 52-4, Arb. Tr. ("Arb. Tr."). Three NFLPA lawyers participated too (Award ¶ 4.10), one of whom Johnson put on his witness list, but chose not to call. Ex. C, Basis of Appeal at 1.[4]

At the hearing, Johnson testified that just before his failed drug test, he (twice) took a liquid substance that he obtained from an unidentified "friend" that was [redacted] or [redacted]. Award ¶¶ 6.49, 6.55, 6.57; Arb. Tr. 93:20-22, 95:1-7. Specifically:

> Q. How many times did you take [redacted]?
> A. I took it twice.
> Q. And when do you recall having taken it, approximately?
> A. I guess a couple of days before the test.
> . . .
> Q. And so did you take some of that [redacted] from your buddies?
> A. Yes.
> Q. And that was in a liquid form, not in a pill form, correct?
> A. Yes.
> Q. And that's what you consumed a couple of days before you ended up testing positive for [redacted], correct?
> A. Yes.
> . . .
> Q. And then in July of 2016, you took [redacted] at the suggestion of your friends, correct?
> A. Yes.
> Q. And it was within a few days after that that you tested positive, correct?
> A. Yep.
> ARBITRATOR CARTER: Let me understand this. It was not just at the suggestion of your friends, but you actually got the [redacted] from a friend?
> THE WITNESS: Yeah. I didn't buy it, but he had it and I took it.

[4] With the Court's permission, the NFLPA will file unredacted versions of the Award (Exhibit A), an excerpt from the Arb. Tr. (Exhibit B) and the Basis of Appeal (Exhibit C) under seal.

Arb. Tr. 73:15-19; 93:17-94:1; 94:15-25.

Johnson sent for testing what he avers to be a sample of the substance he purposefully ingested; it came back positive for the banned PES. *Id.* 105:18-106:4; Award ¶ 6.56.

C. The Final and Binding Award

On October 11, 2016, Arbitrator Carter issued his 12-page written decision, addressing point-by-point Johnson's Basis of Appeal plus evidence from the hearing. Based on the evidence presented during the arbitration hearing, including Johnson's myriad admissions, Arbitrator Carter affirmed Johnson's 10-game suspension:

> While training prior to camp during the summer of 2016, Mr. Johnson was told over lunch by friends after a workout that "there was a faster acting version" of [redacted] called [redacted] Mr. Johnson testified that a friend provided to him and he consumed what was described to him as [redacted], in a [redacted], on two occasions prior to his July 12, 2016 test. (Tr. 72-73)
>
> . . .
>
> [redacted] drug regulated by the FDA. [redacted] (Tr. 191), and a non-FDA-approved product that might be available on the Internet described as [redacted] or what is provided by a friend and described as [redacted] would be considered [redacted] and would be highly unlikely to be precisely the same as the [redacted].
>
> . . .
>
> Mr. Johnson appears to have consumed an [redacted], which he incorrectly believed to be equivalent to prescription [redacted], which likely was the source of the [redacted] in his positive test of July 12, 2016.
>
> Mr. Johnson knew that the product he consumed was not [redacted], and he appears to have relied on assurances from friends and the single word "OKAY" on a web site showing a [redacted] as the basis for determining that he could safely proceed.
>
> Mr. Johnson's conduct in doing so was negligent and does not provide a basis for a defense to the imposition of a sanction in this case.

Award ¶¶ 6.49, 6.55, 6.57-6.59.[5] Unless Johnson succeeds in his vacatur motion, the Award is

[5] Among other things, Arbitrator Carter held that (1) Johnson's positive test "occurred while he was properly in the reasonable cause testing program"; (2) the laboratory director was permitted to certify Johnson's sample in light of the NFLMC and NFLPA's agreement granting the director such authority, and even if a deviation from the Policy occurred, it was authorized by the NFLMC

final and binding. Policy at 16.

After the Award was issued, Johnson publicly stated: "as far as supplements, I don't take anything. I just eat food, and that's it. I'm really cautious. *I try to not make any more dumb decisions.*"[6]

D. The Instant Action

Johnson served his 10-game suspension. Approximately three months after Arbitrator Carter issued his Award, Johnson commenced this "hybrid" Section 301 Labor-Management Relations Act ("LMRA") and DFR case against the NFL, NFLMC and NFLPA.[7] The lone injuries Johnson allegedly suffered stem from the Award and Johnson's ensuing suspension and financial consequences. *See, e.g.*, FAC ¶ 345(c) (asking that Award be declared "null and void"); *id*., Prayer for Relief ¶ (c) (seeking "[a] judgment granting Johnson's petition to vacate the Award"); *id.*, ¶ (f) (seeking "damages Johnson has suffered or will suffer as a result of . . . the Award"); *id.*, ¶ (g) (seeking "damages caused by the improper Award").

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and NFLPA and "did not materially affect the accuracy or reliability of the test result"; (3) there was no deviation from the Policy concerning the destruction of Johnson's positive specimen, and even if there were, it would not "have materially affected the accuracy or reliability of the test result"; (4) Johnson's argument regarding the "handling" of his "B" sample was "untimely," "essentially abandoned," and there was "no evidence that any deviation would have had a material effect on the accuracy or reliability of the test result"; and (5) the documents requested by Johnson's "toxicological observer[s]" were "not permitted by the Policy." Award ¶¶ 6.1-6.42. The PES Policy expressly contemplates that the Arbitrator will consider whether an alleged deviation "materially affect[ed] the accuracy or reliability of the test result." Policy at 17.

[6] NBC Sports, *Lane Johnson on PEDs: I'm not Steve Lattimer from 'The Program'* (July 28, 2017), *available at* http://profootballtalk.nbcsports.com/2017/07/28/lane-johnson-on-peds-im-not-steve-lattimer-from-the-program/ (emphasis added).

[7] Johnson filed his original Complaint on January 6, 2017 and his FAC on February 14, 2017 in the Northern District of Ohio case 5:17-cv-00047-SL.

ARGUMENT

I. RULE 12(B)(1): JOHNSON HAS FAILED TO MEET HIS BURDEN TO PLEAD ARTICLE III STANDING

A. To Establish Article III Standing, Johnson Must Clearly Allege Facts Demonstrating That His Alleged Injuries Are Fairly Traceable to the NFLPA

The "irreducible constitutional minimum" of standing under Article III requires a plaintiff to show an (1) "injury in fact" (2) that is "fairly traceable to the challenged conduct of the defendant" and (3) "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.* (citation omitted). Conclusory allegations of injury are insufficient. *See, e.g.*, *Amidax*, 671 F.3d at 146.

Article III requires that the asserted injury be "'real,' and not 'abstract.'" *Spokeo*, 136 S. Ct. at 1548 (citation omitted). This "requires a concrete injury even in the context of a statutory violation." *Id.* at 1549. A plaintiff does not automatically satisfy the injury in fact requirement "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* And, as this Circuit has recently held, "[t]o satisfy the requirements of Article III standing, a plaintiff must show that . . . there is a ***causal connection*** between the injury and defendant's actions." *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 507-08 (S.D.N.Y. 2017) (citation omitted; emphasis added).

The FAC clearly alleges that Johnson's only claimed injury is the adverse Award and ensuing suspension and financial/contractual penalties. Yet, as detailed below, despite a kitchen sink of accusations about NFLPA conduct purportedly violating the Union's DFR and the LMRDA, the Award is "fairly traceable" to none of it. *Spokeo*, 136 S. Ct. at 1547.

These standing principles of course apply with equal force to Johnson's LMRDA claim, *i.e.*, he must plead his suspension was caused by the Union's alleged non-disclosure of collective

bargaining agreements. *See Peterson v. Transp. Workers Union of Am., AFL-CIO*, 75 F. Supp. 3d 131, 135-36, 138 (D.D.C. 2014) (dismissing LMRDA and DFR claims under Rule 12(b)(1) where plaintiffs failed to "allege likely injury arising from [union conduct]"). And Johnson's declaratory judgment Count likewise requires well-pleaded allegations of injury traceable to the NFLPA. *Correction Officers' Benevolent Ass'n v. City of N.Y.*, 192 F. Supp. 3d 369, 372 (S.D.N.Y. 2016). The FAC fails to allege injury on each of these Counts.

B. Johnson Has Failed to Plead Injury in Fact Traceable to the NFLPA's Alleged Conduct

At the threshold, Johnson's conclusory allegations that the NFLPA's conduct "resulted in serious, substantial, material harm to Johnson and his rights and interests" (FAC ¶¶ 303, 315, 332) must be rejected out of hand. *See Amidax*, 671 F.3d at 146 (finding that plaintiff failed to plead injury in fact and noting that "[i]t is well established that we need not 'credit a complaint's conclusory statements without reference to its factual context'") (citation omitted); *Treiber v. Aspen Dental Mgmt., Inc.*, 635 F. App'x 1, 3 (2d Cir. 2016) (an allegation that "is wholly conclusory and unsupported by any facts . . . is insufficient to support standing").

Nowhere in his 345-paragraph FAC does Johnson explain how the NFLPA's purported breaches of the DFR or the LMRDA caused him to lose his appeal. Nor could he; Arbitrator Carter expressly denied Johnson's appeal because of his testimony about repeatedly ingesting a banned substance. This alone dooms the FAC under Rule 12(b)(1).

Johnson has never denied taking a substance banned by the PES Policy; instead, his counsel argued to the Court that "[t]here is no confirmed test that [Johnson] violated [the PES Policy] relative to the substance in question." Ex. D, Aug. 24, 2017 Hr'g Tr. 18:16-18. But that argument is nonsensical and contrary to the incorporated-by-reference arbitral record. Johnson admitted that he ingested an [redacted] in liquid form that he obtained from an unidentified

"friend," and shortly thereafter he tested positive for a substance banned by the PES. If someone admits that he drank coffee and then tests positive for caffeine there is no mystery about whether the coffee was caffeinated. That is what Arbitrator Carter found.

Digging deeper, virtually all of Johnson's allegations against the Union fall into one of two categories: (1) claims about alleged conduct that Johnson raised at the underlying arbitration and were rejected by Arbitrator Carter as meritless and immaterial given Johnson's admissions, and thus *ipso facto* could not (and in fact did not) change the outcome of the arbitration; and (2) claims concerning arbitrator selection that Johnson knew about but chose not to present on appeal and thereby waived.

First, Johnson alleges that the NFLPA breached its DFR by "[e]liminating or effectively eliminating the [Chief Forensic Toxicologist] position"; "[r]edefining the period of time a player can be kept in the reasonable cause testing program"; and "[f]ailing to require the existence of the Collection Procedures or Section 16 Procedures." FAC ¶¶ 119-121. Johnson made each of these arguments at the arbitration and Arbitrator Carter rejected all of them as meritless and not material to the disciplinary determination. *E.g.*, Award ¶ 6.26 (Chief Toxicologist retired and the bargaining parties agreed to have the Director of the UCLA Olympic Testing Laboratory fulfill his role); *id.* ¶ 6.16 (as a prior PES Policy violator, Johnson's reasonable cause test was authorized by the *Policy and Johnson himself testified that he understood he would remain on reasonable cause testing until told otherwise*) (emphasis added); *id.* ¶¶ 6.21-6.42 (rejecting Johnson's arguments that there were collection and testing PES Policy deviations and holding that in any event none of the alleged deviations "would have had a material effect on the accuracy or reliability of the test result" (*id.* ¶¶ 6.27, 6.30, 6.35, 6.42)).

Thus, Johnson cannot plausibly aver that any of this alleged NFLPA misconduct caused

him to lose his disciplinary appeal when Arbitrator Carter expressly rejected these very arguments as a basis for overturning the discipline. In other words, this is the unusual case where the Court *knows* that Johnson's allegations—even if true—are not fairly traceable to the arbitral outcome *because the arbitrator said so.* Not only would it be implausible for Johnson to allege otherwise, he is bound by Arbitrator Carter's rulings until and unless the Court vacates the Award.

Second, Johnson alleges that the NFLPA "[f]ail[ed] to require a minimum of three arbitrators without any affiliation to the National Football League or its clubs"; "[f]ail[ed] to ensure that the Notice Arbitrator was properly seated"; "[f]ail[ed] to ensure that any of the arbitrators are seated properly"; and "[e]liminat[ed] or effectively eliminat[ed] the requirement that arbitrators not be affiliated with" the NFL, NFL clubs or NFLPA. FAC ¶¶ 115-118. Again, even assuming *arguendo* these averments about arbitrator assignment were true and technical violations of the DFR and/or LMRDA, they did not plausibly cause any injury to Johnson given his own testimony.

Moreover, Johnson knew the identity and number of neutral arbitrators before the appeal hearing (*e.g.*, *id.* ¶¶ 60-61), raised these very questions about arbitrator assignment,[8] but chose not to pursue them in his Basis of Appeal or at the appeal hearing. Award ¶¶ 5.1-5.2. Johnson thus waived the arguments that these alleged deviations from the Policy were a basis to overturn his discipline. *See Ilios Shipping & Trading Corp v. Am. Anthracite & Bituminous Coal Corp*, 148 F. Supp. 698, 700 (S.D.N.Y.), *aff'd sub nom. Ilios Shipping & Trading Corp. v. Am. Anthracite & Bituminous Coal Corp.*, 245 F.2d 873 (2d Cir. 1957) ("Where a party has knowledge of facts

[8] During a pre-hearing discovery dispute, Johnson's counsel raised the same questions about the arbitrator selection process that it raises now: "There are already examples of the NFL's deviation from that policy, *and while we have no objection to your qualifications*, the citizen [*sic*] arbitrator in this matter, it is also clear that the letter of the policy with regard to arbitrator assignment has been deviated from, and there's no indication as to why or where that came from." Disc. Hr'g Tr. 6:2-10 (emphasis added). Johnson, however, dropped the arbitrator assignment argument at the appeal hearing, presumably because he "ha[d] no objection to [Carter's] qualifications." *Id.*

possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection."). He cannot now be heard to argue that the NFLPA's alleged arbitrator assignment misconduct impacted the outcome of the arbitration appeal when Johnson previously said he had no objection to the qualifications of the arbitrator and chose not to present, and thus waived, this argument.

Finally, the FAC accuses the NFLPA of failing to support Johnson at the appeal hearing (despite the fact that Johnson's counsel in this action also represented him at the hearing, *infra*) and of withholding certain documents. But he does not and could not plausibly allege that such purported conduct is the reason why he lost his appeal. Similarly, the FAC contains a sprinkling of accusations about the NFLPA "colluding" with the NFL and "retaliating" against Johnson that are entitled to no weight under either Rule 12(b)(1) (*supra*) or 12(b)(6) (*infra*) because they are conclusory. In any event, these allegations also suffer from the absence of injury in fact traceable to the NFLPA because there is no plausible factual allegation that these frivolous and summary claims of "collusion" and "retaliation" caused Johnson to lose his disciplinary appeal.

No amount or nature of accusations against the NFLPA could change the fundamental and undisputed fact that Johnson lost his appeal and was injured because of his own admitted conduct—not because of anything the NFLPA allegedly did or did not do. He thus lacks standing for all Counts against the NFLPA.

C. Johnson's Declaratory Judgment Claim Must be Dismissed for the Additional Reason that He Has Only Alleged Past Injury

As described above, the *only* injury that Johnson suffered is from the denial of his appeal and suspension. But a plaintiff seeking declaratory relief "cannot rely on past injury to satisfy the injury requirement"; rather, he "must show . . . that he or she will be injured in the future."

Correction, 192 F. Supp. 3d at 372 (citation omitted). Johnson's allegations (FAC ¶¶ 342-343) stating that the harm imposed continues to this day are insufficient because the FAC also acknowledges that he has already served his suspension and paid his fines. There also is no allegation that a future injury is "*certainly* impending." *Correction*, 192 F. Supp. 3d at 372 (citation omitted; emphasis in original). Indeed, the FAC does not allege a significant likelihood that his employment will be terminated or that he plans to again violate the PES Policy such that the voided guarantees or continued reasonable cause testing constitute a cognizable harm. *See id.* at 373 (finding "threat of injury" to be "simply too remote" to establish standing "[b]ecause plaintiffs articulated no intent to engage in conduct that would lead to their arrest"). On the contrary, Johnson publicly stated that he would "try to not make any more dumb decisions."[9]

In addition, if the DFR and LMRDA claims are dismissed (*infra*), all that would be left are Johnson's requests for declarations that would constitute improper advisory opinions.

[9] NBC Sports, *Lane Johnson on PEDs: I'm not Steve Lattimer from 'The Program'* (July 28, 2017), *available at* http://profootballtalk.nbcsports.com/2017/07/28/lane-johnson-on-peds-im-not-steve-lattimer-from-the-program/ (emphasis added).

II. RULE 12(B)(6): JOHNSON HAS FAILED TO STATE ANY VIABLE CLAIM AGAINST THE NFLPA

Independent of Johnson's inability to establish Article III standing, the FAC also is devoid of a single plausible claim against the NFLPA. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "[L]abels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

A. Johnson Has Failed to Meet his "Enormous Burden" to State DFR Claims

This action is a classic "hybrid § 301/fair representation claim" because Johnson alleges that the NFL violated the CBA and Section 301 of the LMRA in tandem with the Union violating its DFR. *See Bejjani v. Manhattan Sheraton Corp.*, No. 12 Civ. 6618 (JPO), 2013 WL 3237845, at *8 (S.D.N.Y. June 27, 2013), *aff'd*, 567 F. App'x 60 (2d Cir. 2014) (citation omitted). "To establish a hybrid § 301/DFR claim, a plaintiff must prove *both* (1) that the employer breached a collective bargaining agreement and (2) that the union breached its duty of fair representation vis-a-vis the union members." *Id.* (emphasis added). Indeed, as Johnson's counsel conceded during the August 24, 2017 conference, "this is a 301 type of case" where Johnson must prove both a "breach of contract" by the NFL and a "breach[] [of the] duty of fair representation" by the NFLPA. Ex. D, Hr'g Tr. 39:15-18. In other words, "if the employer is not liable to the employee, neither is the union." *Acosta v. Potter*, 410 F. Supp. 2d 298, 309 (S.D.N.Y. 2006). Thus, if Johnson's claims against the NFL are dismissed or otherwise defeated, his DFR claims against the Union must also fail.

That aside, to state a DFR claim, a plaintiff must plausibly allege at least two elements: (1) "the union's actions or inactions are either arbitrary, discriminatory, or in bad faith"; and (2) there

is "a causal connection between the union's wrongful conduct and [his] injuries." *Bejjani*, 2013 WL 3237845, at *6 (citing *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 709-10 (2d Cir. 2010)). Judicial review of DFR claims is "highly deferential, recognizing the wide latitude that [unions] need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991). As this Circuit has observed, "[b]ecause federal policy gives unions wide latitude to act in their representative capacity, a plaintiff's obligation to plead sufficient conduct to state a claim for breach of the DFR imposes 'an ***enormous burden***.'" *Dillard v. Seiu Local 32BJ*, No. 15 Civ. 4132(CM), 2015 WL 6913944, at *4 (S.D.N.Y. Nov. 6, 2015) (citation omitted; emphasis added). "To survive a motion to dismiss, a DFR plaintiff 'must set forth concrete specific facts from which one can infer a union's discrimination, bad faith or arbitrary exercise of discretion. Conclusory allegations, without supporting facts, fail to state a valid claim.'" *Id.* (citations omitted).

What's more, because Johnson has asserted a "hybrid" claim under Section 301 of the LMRA, he must not only plead that the union's alleged conduct was arbitrary, discriminatory or in bad faith, but additionally that it "***contributed to*** the arbitrator's making an ***erroneous decision***." *Roy v. Buffalo Philharmonic Orchestra Soc'y, Inc.*, 682 F. App'x 42, 46 (2d Cir. 2017) (citation and quotations omitted; emphases added); *Nicholls v. Brookdale Univ. Hosp. & Med. Ctr.*, 204 F. App'x 40, 42 (2d Cir. 2006) (the union's purported conduct "must have seriously undermine[d] the arbitral process"); *Bejjani*, 2013 WL 3237845, at *8 (plaintiff can bring a hybrid claim "***only if*** the employee can show that either failure to pursue the grievance process or the unsuccessful result thereof was '***due to*** the Union's wrongful conduct'") (citing *Acosta*, 410 F. Supp. 2d at 308) (emphases added); *Nieves v. Dist. Council 37 (DC 37), AFSCME, AFL-CIO*, No. 04 Civ. 8181 (RJS), 2009 WL 4281454, at *10 (S.D.N.Y. Nov. 24, 2009), *aff'd sub nom. Nieves v. Roberts*, 420

F. App'x 118 (2d Cir. 2011) ("Even where the union's actions are 'arbitrary, discriminatory, or in bad faith,' a cause of action for breach of the duty of fair representation only lies where the union's action "'seriously undermine[d] the arbitral process'") (Sullivan, J.) (citation omitted); *Hogan v. 50 Sutton Place S. Owners, Inc.*, 919 F. Supp. 738, 743 (S.D.N.Y. 1996) ("even if [plaintiff] had established a breach of the duty of fair representation, he still could not recover ***unless*** he also demonstrated that the breach ***caused*** the ***erroneous outcome*** of the grievance") (emphases added). The FAC does not come close to satisfying the myriad legal standards required of a hybrid DFR claim in this Circuit.

1. Johnson Has Failed to Plausibly Allege that the NFLPA's Purported Conduct Contributed to Any Erroneous Decision

For the same reasons described above, Johnson cannot plausibly aver that there was anything erroneous about the Award, much less that the NFLPA seriously undermined the arbitral process and caused the arbitral outcome. Once it was established that Johnson took a banned PES, Arbitrator Carter had no discretion as to the amount of discipline—the PES Policy expressly mandates that, as a second offender, Johnson had to be suspended for 10 games, and arbitrators are not authorized to modify discipline (they may only affirm or vacate). *See* Policy at 10, 16. As such, the arbitral outcome was undeniably correct and Johnson's DFR claims must be dismissed.

Furthermore, Johnson cannot and does not plausibly allege that his unsuccessful appeal was "due to" the NFLPA's alleged conduct or how such conduct "contributed to" the purportedly erroneous award.[10] As discussed above, there is no plausible causal connection between the alleged NFLPA conduct and the denial of Johnson's arbitral appeal. *See Roy*, 682 F. App'x 42 at

[10] Johnson's conclusory allegations that the NFLPA's purported conduct "substantially tainted, contributed to, and more than likely affected the outcome of the erroneous Award" (FAC ¶ 144; *see also id.* ¶¶ 213, 220, 302, 331) are entitled to no weight. *Twombly*, 550 U.S. at 555.

47 (affirming dismissal of DFR claim where "none of [plaintiff's] allegations nudge his claim from conceivable to plausible evidence of bad faith, let alone suggest that they might have altered the outcome of the arbitration"); *Nicholls*, 204 F. App'x at 42 (affirming dismissal of DFR claim where "it is unclear whether the lack of production [of "potentially exonerating documents"] 'seriously undermine[d] the arbitral process'") (citation omitted); *Bejjani*, 2013 WL 3237845, at *16 (dismissing hybrid action where plaintiff alleged that union concealed documents and conspired with employer because such conduct did not "seriously undermine[] the arbitral process"); *Nieves*, 2009 WL 4281454, at *12 (dismissing DFR claim because "there is no indication that Plaintiff's inability to obtain the documents affected the outcome of the arbitration").

In any event, Johnson's DFR claims must also be dismissed because he has failed to meet his enormous burden to establish that the Union acted in an arbitrary, discriminatory or bad faith manner as shown below.

2. Johnson Has Failed to Set Forth Concrete Specific Facts Regarding the NFLPA's Purported Arbitrary, Discretionary or Bad Faith Conduct

"A union's actions are 'arbitrary only if, in light of the legal and factual landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational.'" *Bejjani*, 2013 WL 3237845, at *7 (citing *O'Neill*, 499 U.S. at 67). "This 'wide range of reasonableness' gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45-46 (1998). Indeed, the test for arbitrariness is "difficult to meet." *Bejjani*, 2013 WL 3237845, at *7 (citation omitted). "A union's acts are discriminatory when 'substantial evidence' indicates that it engaged in discrimination that was 'intentional, severe, and unrelated to legitimate union objectives.'" *Id.* (citing *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 301 (1971)). A union acts in bad faith when there is "proof that

the union acted with 'an improper intent, purpose, or motive," which "encompasses fraud, dishonesty, and other intentionally misleading conduct." *Id.* (citing *Spellacy v. Airline Pilots Ass'n–Int'l*, 156 F.3d 120, 126 (2d Cir. 1998)).

Johnson recites the DFR standard but never identifies which of his complaints about the NFLPA are supposed to be arbitrary, bad faith, and/or discriminatory. *See* FAC ¶¶ 301, 330. Even more fundamentally, Johnson's individual allegations against the NFLPA reveal that his accusations of "collusion" and "retaliation" are conclusory labels devoid of plausible facts, and his more specific factual claims against the Union concerning arbitrator selection and PES Policy administration do not come close to arbitrary, bad faith, or discriminatory behavior—in fact they are not even complaints that are specific to Johnson or his arbitral appeal.

i. Johnson's Conclusory Accusations of "Collusion" and "Retaliation" Fail as a Matter of Law

To be sure, allegations of union-management collusion or union retaliation could give rise to a duty of fair representation claim. But, here, Johnson fails to allege any such facts.

"Collusion." In this Circuit, a plaintiff who makes "conclusory allegations of conspiracy," without alleging "who was involved, and when and where these individuals met and conspired . . . does not rise above *Twombly*'s plausibility threshold." *Bejjani*, 2013 WL 3237845, at *14-15 (dismissing claim that union and employer conspired to retaliate against plaintiff where the complaint alleges no fact as to "why" or "how" they conspired to harm plaintiff); *see also Sahni v. Staff Attorneys Ass'n*, No. 14 Civ. 9873 (NSR), 2016 WL 1241524, at *8 (S.D.N.Y. Mar. 23, 2016), *on reconsideration in part*, No. 14 Civ. 9873 (NSR), 2016 WL 3766214 (S.D.N.Y. May 13, 2016) (dismissing DFR claims alleging conspiracy where there was "no effort to allege an explanation" as to why the union and employer would have, or how they did, act in unison to harm plaintiff). Here, Johnson merely alleges that NFLPA representatives, including Heather McPhee

and Todd Flanagan, at unspecified times, through unspecified means, and for unspecified purposes, "allowed and/or colluded" with NFLMC representatives, including Kevin Manara, to achieve unspecified ends.[11] FAC ¶¶ 217-218, 282-86. This is insufficient.[12]

To the extent Johnson's implication is that the NFLPA improperly entered into CBA-modifying agreements with the NFL, that is not collusion—it is collective bargaining. Johnson purports to disagree with "side agreements" like the NFLPA and the NFL having the Director of the UCLA Olympic Testing Laboratory fulfilling the retired Chief Toxicologist's duties until a new Chief Toxicologist is jointly selected, but that falls within the NFLPA's discretion. Johnson's second-guessing of his Union's decision does not state a DFR claim. *See Marquez*, 525 U.S. at 45.

"Retaliation." Johnson's retaliation allegations are that "[t]he NFLPA retaliated against Johnson because of its public dispute with Johnson . . . by abdicating its representative duties and abandoning Johnson to the caprice of the NFLMC" and that "[t]he NFLPA . . . discipline[d] or retaliat[ed] against Johnson for asserting his rights under the LMRDA." FAC ¶ 287, 314. Johnson does not specify what Union "discipline" he is talking about (there was none), on what basis he

[11] Specifically, Johnson makes the conclusory allegation that "[u]pon information and belief, the NFLPA representatives involved in colluding with the NFLMC, includes, but is not limited to, Heather McPhee and Todd Flanagan" (FAC ¶ 218), but the FAC alleges no facts as to what the NFLPA and NFL colluded about, where, when, why or how such collusion took place, or even a plausible inkling as to how Johnson came up with these names at all—they are simply the NFLPA lawyers who happened to be involved in the arbitration proceedings. These allegations do not pass muster under Rule 11, let alone Rule 8.

[12] Johnson's conspiracy allegations are not only lacking in factual averments, they are contradictory. For example, Johnson claims that "the NFLMC prohibited the Independent Administrator from reporting equally, promptly, and contemporaneously to the NFLPA." FAC ¶ 91. But then a few pages later, Johnson makes the contradictory and conclusory assertion that "[t]he NFLPA allowed and/or colluded in the NFLMC's exclusive exercise of control of the Independent Administrator." *Id.* ¶ 285.

claims any conduct was retaliatory in nature, who carried it out, or any other salient factual detail. His "examples" of "retaliation" are nothing more than an attempt to recycle his other allegations and label them as "retaliatory" without explication beyond the incoherent claim that the NFLPA was retaliating "because of its public dispute with Johnson." *Id.* ¶ 287. Bare allegations that something was done in retaliation does not make it so.

Otherwise, Johnson's retaliation claim appears to be based on the NFLPA's allegedly "[r]efusing to assist or support Johnson with his appeal." *Id.* ¶ 287 (a); *see also id.* ¶¶ 142, 291, 293, 295. But such a claim fails as a matter of law. Unlike numerous unions, the NFLPA permits its members to retain their own outside counsel and pursue their own appeals. The NFLPA does not act as a "gatekeeper" preventing members from pursuing PES Policy appeals. As such, this is not a "typical" case in which a union member sues her union because it failed to pursue a grievance at all. Rather, here, Johnson sweeps under the rug the undisputed facts that he had retained his own counsel for the appeal hearing, his three-lawyer team presented all witnesses and arguments, *and* the NFLPA nonetheless participated in the hearing in support of the player. Award ¶ 4.10.

Nevertheless, even if the Court were to credit Johnson's conclusory assertions about a lack of support, unions have "wide latitude" in processing grievances and do not need to pursue grievances *at all*. *See Dillard*, 2015 WL 6913944, at *5 (no employee "has the absolute right to have his grievance taken to arbitration"); *Bejjani*, 2013 WL 3237845, at *11 ("unions generally enjoy broad discretion in determining when, how, and with which arguments to advance a grievance"); *Barr v. United Parcel Service, Inc.*, 868 F.2d 36, 43 (2d Cir. 1989) ("Tactical errors," "errors of judgment" and "even negligence on the union's part" do not constitute a breach of the DFR). Johnson's argument that the NFLPA had three lawyers participate in the appeal hearing—in addition to Johnson's own three-lawyer team—but they somehow did not do enough, falls short.

ii. Johnson's Remaining Factual Allegations Do Not Rise to the Level of Arbitrary, Bad Faith, or Discriminatory Conduct

Nor do any of Johnson's remaining allegations about the NFLPA—well-pled or not—amount to a DFR claim. It is well-established that "Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union." *O'Neill*, 499 U.S. at 78. "Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Id.*; *see also Marquez*, 525 U.S. at 45-46 (union's wide range of reasonableness "gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong").

Johnson's complaints about NFLPA arbitrator appointments, agreeing to the retired Chief Toxicologist's duties being fulfilled by the Director of the UCLA Olympic Testing Laboratory, and supposedly lacking vigilance in monitoring laboratories' collection and testing procedures are beyond the purview of courts' review. Notably, Johnson has no right to select arbitrators—the NFL-NFLPA CBA and the 2015 PES Policy provide that the NFL/NFLMC and NFLPA choose the neutral arbitrators under the PES Policy. Thus, the question is: was it within the Union's discretion to have a pool of two neutral arbitrators instead of three, or to select Arbitrator Carter, knowing that he was affiliated with the WilmerHale law firm and served as an arbitrator under the Policy and Program for Substances of Abuse?[13] *See, e.g.*, FAC ¶¶ 289, 317-329. The answer, as

[13] Johnson's allegation that Carter "failed to disclose" the "conflicts" resulting from the "material relationship" between WilmerHale and the NFL or from his service as an arbitrator under a separate policy *to Johnson* (FAC ¶¶ 195-96, 198-200, 237, 327-28) is a red herring. First, these alleged conflicts were known or knowable to Johnson with due diligence. Second, because the PES Policy arbitrators are selected by management and the Union, the relevant issue is whether Arbitrator Carter failed to disclose his purported "conflicts" to the NFLPA, not to Johnson. There is no allegation or evidence that Arbitrator Carter failed to do so.

a matter of law, is clearly "yes."

For starters, *none* of the NFLPA's purported misconduct was *directed at Johnson* (and thus could not have been "discriminatory" or "retaliatory"). For example, a rotation of two neutral arbitrators has handled PES Policy appeals for other NFL players and the Director of the UCLA Olympic Testing Laboratory has been fulfilling the former Chief Toxicologist's duties since he retired. Johnson does not allege—because he cannot—that any of this conduct was specifically directed at him. As such, he is at most disagreeing with the NFLPA's decision-making and administration of the PES Policy, not plausibly alleging it was discriminatory or retaliatory. Indeed, hardly any of Johnson's complaints about the NFLPA are specific to *him* or *his arbitral appeal.*

Nor do any of Johnson's allegations smack of bad faith or arbitrariness. Having the Director of the UCLA Olympic Testing Laboratory fulfill the role of a toxicologist who informed the NFLPA and NFLMC of his retirement is hardly the stuff of a DFR claim. So too with respect to the appointment of two neutral arbitrators instead of three when (i) there is no dispute about their availability to timely hear Johnson's appeal and (ii) Johnson had "no objection to [Arbitrator Carter's] qualifications." Disc. Hr'g Tr. 6:2-10. Further, with respect to the collection procedures, Arbitrator Carter expressly held that they did *not* deviate from the PES Policy. Award ¶¶ 6.27, 6.30, 6.35. Plus there is not one factual allegation that the NFLPA's (unspecified and purported) neglect in overseeing the collection and testing of Johnson's specimen was arbitrary or in bad faith.

At bottom, Johnson's allegations do not satisfy his "enormous burden" to state a DFR claim, *Dillard*, 2015 WL 6913944, at *4 (citation omitted), and thus his DFR claims must be dismissed.

B. Johnson Has Not Stated a LMRDA Claim

Johnson has likewise failed to state a LMRDA claim. He alleges that "[t]he NFLPA has

refused to share with Johnson [] purported modifications to the collectively bargained 2015 Policy." FAC ¶ 308. He cites Section 104 of the statute, *id.* ¶ 25, which concerns union document disclosure and required the NFLPA "to forward a copy of each collective bargaining agreement . . . to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement." 29 U.S.C. § 414.

First, Johnson does not allege that the NFL-NFLPA collective bargaining agreement isn't available to him (it is available to anyone with an internet connection).[14] Rather, he avers that he did not receive modifications to the PES Policy (what Johnson pejoratively calls "side deals") concerning the retirement of the Chief Toxicologist and the number of neutral arbitrators in the pool. But the LMRDA does not function such that every and any time the NFLPA and NFL reach some agreement the NFLPA must make an instant mailing to its 2,000 members. Rather, courts have held that unions are required to provide members with full collective bargaining agreements, not amendments that have not yet been incorporated. *See Summerville v. Local 77*, 369 F. Supp. 2d 648, 658–59 (M.D.N.C.), *aff'd*, 142 F. App'x 762 (4th Cir. 2005) ("Plaintiff's document request within the AFSCME hearing proceedings for '[a]ll new Articles that will appear in the new agreement as they will read in the new Union Book' . . . is not a request for a copy of the full collective bargaining agreement within the meaning or coverage of § 414"). When a union member has access to the collective bargaining agreement, as Johnson does, his claim must be dismissed.[15]

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[14] NFL-NFLPA CBA, *available at* https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf; PES Policy, *available at* https://www.nflpa.com/active-players/drug-policies.

[15] *See Gonzalez v. Local 32BJ, SEIU*, No. 09 CIV. 8464 SHS RLE, 2010 WL 3785436, at *4 (S.D.N.Y. Sept. 7, 2010), *report and recommendation adopted*, No. 09 Civ. 8464 (SHS) (RLE), 2010 WL 3785363 (S.D.N.Y. Sept. 28, 2010) ("[Plaintiff] submitted a copy of the CBA with his Complaint. Thus, since [Plaintiff] has a copy of the Agreement, the issue is moot and he has no §

Second, Johnson cannot plausibly aver that his rights were "directly affected by" the side agreements or modifications that the NFLPA allegedly failed to provide him. *Acosta v. Local Union 26, Unite Here*, No. CV 16-10396-GAO, 2017 WL 1731690, at *3 (D. Mass. May 3, 2017) ("a member whose rights are not directly affected by an agreement is not entitled to a copy of that agreement"). The Award rejected Johnson's arguments that any of the supposed "side deals" could somehow change the arbitral outcome. *Supra.* He should not be heard to now argue that an alleged lack of documentation on these rejected/waived arguments "directly affected" his rights.

CONCLUSION

For the reasons set forth above, all Counts against the NFLPA should be dismissed with prejudice.

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Respectfully submitted,

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414 claim"); *Mazza v. Dist. Council of N.Y.*, No. Civ. 6854 (BMC) (CLP), 2007 WL 2668116, at *14 (E.D.N.Y. Sept. 6, 2007) ("[P]laintiff was ultimately provided with a copy of the [CBA]. Therefore, the Union is in compliance with the LMRDA").